No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD LOWRANCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in the context of a federal criminal prosecution against an extremely wealthy defendant who claimed his wealth showed lack of motive, it is permissible for the trial court to presume lack of prejudice against the wealthy and accordingly refuse to question prospective jurors during voir dire about their possible anti-wealthy bias.

2. Whether expert testimony, offered by the defendant in a federal criminal case to impeach a key prosecution witness, can be excluded based on a purported lack of personal knowledge.

LIST OF PARTIES TO JUDGMENT BELOW

1. Richard D. Lowrance, defendant-appellant below and petitioner herein.

2. Judd Hirschberg, defendant-appellant below.

3. United States of America, plaintiff-appellee below and respondent herein.

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PETITION FOR WRIT OF CERTIORARI

Mr. Richard Lowrance petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*), is reported at 988 F.2d 1509 (7th Cir. 1993).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*), was entered on March 19, 1993. A timely petition for rehearing was denied on June 1, 1993 (App. C, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule of Evidence 104 provides in part:

> **(a) Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . .

Federal Rule of Evidence 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

Petitioner Richard Lowrance and a co-defendant, Judd Hirschberg, were each convicted by a jury of altering or removing vehicle identification numbers, 18 U.S.C. § 511(a), and mail fraud, 18 U.S.C. § 1341. Lowrance and Hirschberg, both successful traders on the Chicago Mercantile Exchange, had long been acquainted with each other.

The convictions stemmed from the reported theft of Hirschberg's silver 1981 Mercedes Benz 380 SL on October 23, 1984 on the North Side of Chicago. Mr. Hirschberg later received a $43,300 insurance settlement for the theft. (Tr. 249-254; 988 F.2d at 1510). The Mercedes was

seized by Miami, Florida police on September 1, 1988, after the vehicle identification number ("VIN") had been switched. (988 F.2d at 1510-11). At the time of seizure, the vehicle was registered, under the new VIN, to Mr. Lowrance's mother, with Mr. Lowrance designated as a lienholder. (Tr. 310-22, 389-90; 988 F.2d at 1511).

In the late afternoon on September 1, Campbell, a Miami auto theft detective reached Hirschberg by phone at the home of Hirschberg's girlfriend in Colorado and told him that his car had been recovered in Richard Lowrance's possession and registered in Lowrance's mother's name. (Tr. 687-689). Hirschberg responded that he knew Lowrance from the Chicago Mercantile Exchange, that they had a social relationship, and that Lowrance was a successful multi-millionaire trader. The conversation concluded with Hirschberg's promise to have Lowrance call Campbell. (Tr. 729).

Although a stipulated telephone record showed a telephone call from Mr. Lowrance's office to the Miami Police Department on September 2, Campbell denied that he, or any other Miami police officer, spoke with Mr. Lowrance on September 2. The call lasted 8.5 minutes and was placed to the number on Campbell's business card which he gave the day before to Eddie Yoshimura, a friend of Lowrance's who was driving the Mercedes when it was seized. (Tr. 532, 533, 758-62, 1232). Campbell testified that he did not speak with Lowrance until September 14. He stated that between September 2 and 14, he did nothing to contact Mr. Lowrance. (Tr. 758).

Campbell testified that on September 1 and 2, 1988, he kept all his files and reports (including those relating to the seizure of the Mercedes on September 1) in a big cardboard box which he carried with him, at all times, even

when he left his desk momentarily. (Tr. 690). He claimed that this protectiveness was necessary because he was investigating other Miami police officers.

Immediately after Mr. Lowrance's 2:47 p.m. phone call to Campbell's number at the Miami Police Department on September 2, he called Mr. Hirschberg at 2:56 p.m. (Tr. 1232). The government theorized that because only Campbell at Miami Police knew about the Hirschberg connection to the seized car—the files all being in Campbell's box—Mr. Lowrance's call to Hirschberg in Colorado demonstrated guilty knowledge. (Tr. 153, 1336).

According to Campbell, he first spoke to Mr. Lowrance on September 14 when Lowrance responded to a message Campbell left earlier that day on Lowrance's answering machine. (Tr. 690-92, 698). Mr. Lowrance's September 14 call was to the same phone number as his September 2 call. Campbell testified that he told Mr. Lowrance the Mercedes was earlier reported stolen by Hirschberg.

At trial, Mr. Lowrance intended to introduce evidence of his wealth to show absence of motive. During voir dire, Mr. Lowrance requested that the district court pose a single question to potential jurors concerning their possible bias against the wealthy. The district court refused, and the Court of Appeals upheld that refusal. 988 F.2d at 1514-15. The appeals panel held that the district court did not abuse its discretion in omitting the question because the possibility of anti-wealthy bias was speculative, the wealthy were not a "suspect classification," and the "practical realities" prevented the district court from asking all voir dire questions tendered by the parties. 988 F.2d at 1515.

In an effort to impeach Campbell's testimony, Mr. Lowrance sought to present the expert testimony of a

Schaumburg, Illinois auto theft detective, Robert Stachnik. Stachnik, a 21-year veteran of the Schaumburg force including 18 years in auto theft, would have testified that he had never heard of an auto theft detective, or any other type of detective, carrying around all of his active files around with him, as Campbell claimed he had. According to Stachnik, other, more practical means were available to secure files concerning investigations against fellow police officers. In addition to his general knowledge of auto theft investigation practices, Stachnik was familiar with police practices in Florida and Illinois.

The district court barred Stachnik's proffered expert testimony, although Stachnik was allowed to testify as a non-expert concerning relevant aspects of a Mercedes Benz theft investigation he had conducted. The Seventh Circuit held that district court had not abused its discretion in excluding the expert testimony because Lowrance had supposedly failed to seek qualification of Stachnik as an expert, and Stachnik supposedly lacked knowledge of Miami police practices and did not know Campbell. 988 F.2d at 1513-14.

REASONS FOR GRANTING THE PETITION

I.

The Seventh Circuit's No-Bias-Against-the-Wealthy Presumption Violated the Defendant's Sixth Amendment Right to Discover and Seek Removal of Jurors Who Were Not Impartial.

The Seventh Circuit in essence held that questioning prospective jurors about their possible biases against wealthy persons is per se, presumptively unnecessary. That ruling is contrary to both the Sixth Amendment right to trial before an impartial jury and this Court's

precedents, which provide that defendants must be afforded a reasonable opportunity to discover potential jurors' relevant prejudices and to exercise peremptory challenges.

In rejecting Mr. Lowrance's claim that there was a reasonable possibility of prejudice against him because of his wealth, the Court of Appeals mistakenly relied on authority holding that the wealthy are not a protected class for strict scrutiny/equal protection purposes. That authority is irrelevant to Sixth Amendment analysis.

If allowed to stand, the Seventh Circuit ruling would undermine Sixth Amendment rights nationally, serving as an unwarranted shield against simple voir dire inquiries that would expose jurors biases against the wealthy, among other classes of defendants.

Under the Sixth Amendment, criminal defendants in federal court are entitled to trial before a jury comprising " 'impartial, 'indifferent' jurors.' " *Morgan v. Illinois*, 504 U.S. ____, 119 L.Ed.2d 492, 501 (1992) (quoting *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961)). The jury's verdict must be based on the evidence at trial, " 'regardless of the heinousness of the crime charged, the apparent guilt of the offender *or the station in life which he occupies*.' " *Id.*, 119 L.Ed.2d at 501 (quoting *Irvin*, 366 U.S. at 721-22) (emphasis added).

Included within the right to trial by an impartial jury is the right to adequate voir dire to reveal unqualified jurors. *Id.*, 119 L.Ed.2d at 503 (citing *Dennis v. United States*, 339 U.S. 162, 171-72 (1950); *Morford v. United States*, 339 U.S. 258, 259 (1950)). " 'Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot

be fulfilled.' " *Id.* (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (White, J., plurality opinion)).

Moreover, " '[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.' " *Morford*, 339 U.S. at 259 (quoting *Dennis*, 339 U.S. at 171-72). Adequate voir dire is also important to enable defendants to fully exercise peremptory challenges to the extent such challenges are available. *Mu'Min v. Virginia*, 500 U.S. ____, 114 L.Ed.2d 493, 509 (1991); *Rosales-Lopez*, 451 U.S. at 188 (White, J., plurality opinion).

Mr. Lowrance intended to introduce evidence of wealth to show absence of motive. To guard against the inevitable resentment this evidence would evoke in susceptible jurors, the district court was asked to pose to the jury a single voir dire question pertaining to possible bias against the wealthy.[1] Despite the relevance and simplicity of the question, the court refused to make the inquiry.

The Court of Appeals affirmed on the grounds that (1) the district court asked more than a hundred questions,[2] (2) "[t]he practical realities of trial do not allow the district court to ask all tendered questions," and (3) there was no need to ask "about speculated bias against the wealthy." (988 F.2d at 1515). That court, in effect, applied a per se presumption that prospective jurors were not biased against the wealthy; a presumption that violated

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[1] The question about possible bias against the wealthy was one of only 18 voir dire questions which Mr. Lowrance submitted to the district court.

[2] Some of the questions came from Mr. Lowrance's co-defendant, but the majority were boilerplate questions posed by the court and routinely asked in every criminal case.

both Mr. Lowrance's Sixth Amendment right to an adequate voir dire, *Morgan*, 119 L.E.2d at 503, and the longstanding judicial recognition of anti-wealthy bias. *See, e.g., United States v. Socony-Vacuum Oil*, 310 U.S. 150, 237-239 (1940) (condemning prosecutor's appeal to jurors' prejudice against "influential, wealthy millionaires or billionaires"); *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 308-09 (1931) (condemning prosecutor's argument to jury that defendants were "stock traders who are able to pay fat [legal] fees").

Although trial judges are afforded a great deal of discretion in supervising voir dire, exercise of that discretion is " 'subject to the essential demands of fairness.' " *Morgan*, 119 L.Ed.2d at 503 (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)). *See also Mu'Min*, 114 L.Ed.2d at 506 (test for whether particular voir dire questions are constitutionally required is fundamental fairness, not mere helpfulness). "In exercising its discretion, the trial court must be zealous to protect the rights of an accused." *Dennis*, 339 U.S. at 168. Furthermore, this Court has greater leeway under its supervisory power in setting voir dire standards for federal trials, such as in this case, than for state court trials governed by the Fourteenth Amendment. *Mu'Min*, 114 L.Ed.2d at 505.

As the Seventh Circuit has recognized, to be adequate, the voir dire must be designed "to uncover bias as to issues in the case and as to the defendant himself." *United States v. Crockett*, 979 F.2d 1204, 1216 (7th Cir. 1992). It "must also provide the defendant the information necessary to exercise his right to peremptory challenges." *United States v. McAnderson*, 914 F.2d 934, 942 (7th Cir. 1990). *Accord, Mu'Min*, 114 L.Ed.2d at 509; *Rosales-Lopez*, 451 U.S. at 188 (White, J., plurality opinion).

Refusing to make *any* inquiry about bias against the wealthy in a case involving an exceptionally wealthy defendant, whose defense rested in large part upon his wealth as showing a lack of motive, heard by a jury of very modest means, is contrary to the "essential demands of fairness" required by cases such as *Morgan*, 119 L.Ed.2d at 503 and *Aldridge*, 283 U.S. at 310, and scarcely creates a reasonable assurance that the particular prejudice involved would be discovered. *United States v. Gillis*, 942 F.2d 707, 709-10 (7th Cir. 1991); *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

Mr. Lowrance's constitutional right to an impartial jury was nullified by his inability to discover the jurors' relevant prejudices through voir dire. *Morgan*, 119 L.Ed.2d at 506. The district court could have substituted its own questions for those submitted by the defendant regarding anti-wealthy bias. Instead it failed to ask any questions of the prospective jurors "which could be deemed to cover the subject." *Aldridge*, 283 U.S. at 311; *accord*, *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (discretion as to form of voir dire inquiry, but some inquiry mandatory).

Unlike the situation in *Rosales-Lopez*, 451 U.S. at 192-93 (White, J., concurring opinion), there were no questions asked during the voir dire which would expose "special circumstances" or "external circumstances" that might have raised a "reasonable possibility" of juror bias.

In sanctioning the district court's blanket refusal to make any inquiry even related to the subject of wealth, the court below created an impossible requirement: Mr. Lowrance was required to prove bias before being allowed to determine its existence. The Seventh Circuit's presumption of an absence of bias against the wealthy is contrary to this Court's precedents.

The general existence of bias against wealthy persons is not mere speculation, contrary to the Seventh Circuit's opinion, 988 F.2d at 1515. The class struggle which has dominated the whole course of history bears witness to the bias that many have against the wealthy. Justice Holmes long ago noted "[t]he unfortunately growing hatred of the poor for the rich". SPEECHES, 56-57 (Little Brown 1934). That bias is traceable to Biblical times. It was not because the mass of men revered the rich that Matthew observed that "it is easier for a camel to go through the eye of a needle, than for a rich man to enter into the Kingdom of God." Matthew 19:24. Indeed, so indement was the bias against the wealthy that the Old Testament found it necessary to admonish, "Curse not the rich in thy bedchamber. . . ." Ecclesiastes 10:20. Ignoring this admonition, many politicians have won office by appealing to class prejudice.

Class bias against the wealthy has also been recognized in many cases, in addition to *Socony-Vacuum*, 310 U.S. 150, 237-239, and *Goff*, 241 Ky. 428, 44 S.W.2d 306, 308-09, cited above. *See Sizemore v. Fletcher*, 921 F.2d 667, 670-71 (6th Cir. 1990) (criminal conviction reversed because of improper prosecutorial appeals to "wealth and class biases"); *United States v. Stahl*, 616 F.2d 30, 32 (2d Cir. 1980) (reversal of conviction because prosecutor argued that defendant was a "multi-millionaire" whose life was "geared to make money in real estate, money, money, money" and whose crime was the result of greed); *United States v. Nill*, 518 F.2d 793, 803 (5th Cir. 1975) (reversal because prosecutor emphasized defendant's wealth and financial ambitions on cross-examination; "If a defendant had been subjected to such an irrelevant, derogatory attack upon his poverty, no court would tolerate it. The rule works both ways. The well to do are entitled to the same fair treatment.").

The Seventh Circuit's additional reasons for rejecting Mr. Lowrance's voir dire claim—the district court asked a lot of questions, and could not ask all questions submitted—should be given no weight. No decision of this or any other court of which we are aware has held that the adequacy of voir dire is to be determined by tallying the number of questions posed to the jury. Further, a trial court's need to pare down the number of questions to be asked does not allow it to brush aside those which are essential to discovering relevant and possible biases or are necessary to exercising peremptory challenges. "[E]xpedition is clearly subsidiary to the duty to impanel an impartial jury." *Dellinger*, 472 F.2d at 370 n.42. *Accord*, *United States v. Ewell*, 383 U.S. 116, 120 (1966) (largely because of defendant safeguards, criminal procedures "are designed to move at a deliberate pace"); *United States v. Walters*, 913 F.2d 388, 393 (7th Cir. 1990) (judicial efficiency does not warrant sacrificing a defendant's right to a fair trial); *Gavino v. MacMahon*, 499 F.2d 1191, 1196 (2d Cir. 1974) (same).

The Seventh Circuit's presumption that prospective jurors are not biased against the wealthy, and applying that presumption to foreclose the need to probe for possible bias of that sort, raises an important Sixth Amendment issue which this Court should address.

II.

The Seventh Circuit Unfairly Narrowed the Scope of Federal Rule of Evidence 702 in Upholding the Exclusion of an Expert Witness Offered by Petitioner.

The Seventh Circuit misread the record in finding that the defense had failed to seek qualification of a witness, an Illinois auto theft detective, as an expert. That court

also misapplied Federal Rule of Evidence 702 in finding that the rule did not authorize the detective's proffered testimony. In the latter regard, the Seventh Circuit held that the detective, Robert Stachnik of the Schaumburg, Illinois police, was properly barred from testifying as an expert because he lacked *personal* knowledge of the matter at issue, even though Rule 702 encompasses no such personal-knowledge requirement. The appeals panel thereby contravened Rule 702 and unfairly restricted Mr. Lowrance's defense on a key issue in violation of his Fifth Amendment right to due process.

The Federal Rules of Evidence "anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder. . . ." *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983). The relevance standard enunciated in Fed. R.Evid. 401 "is a liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ____, 125 L.Ed.2d 469, 479 (1993). Moreover, under Fed.R.Evid. 702, "an expert is permitted wide latitude to offer opinions, including those that are *not based on first-hand knowledge or observation.*" *Daubert*, 125 L.Ed.2d at 482 (emphasis added).

Stachnik's expert testimony was offered to impeach a key prosecution witness—John Campbell, the Miami auto theft detective who seized the stolen Mercedes in Miami on September 1, 1988. (988 F.2d at 1511, 1513). By virtue of his 21 years as a police officer, including 18 as an auto theft detective, Stachnik had "special skill, knowledge, [and] experience" which made his view of Campbell's asserted files handling helpful to the jury. Fed.R.Evid. 702.

It was undisputed that on September 2, Mr. Lowrance made an 8.5 minute call to the Miami Police Department using the phone number on Campbell's business card. Immediately thereafter, Mr. Lowrance called Hirschberg in

Aspen. The government's theory that this call *necessarily* proved a conspiracy between Hirschberg and Lowrance was dependent upon the jury's acceptance of Campbell's testimony that he had not spoken with Mr. Lowrance on September 2, *and* that no one else in the Miami Police Department could have informed Mr. Lowrance about Hirschberg's relationship to the seized car. Campbell insisted that the file on the Mercedes, which reflected Hirschberg's ownership, *like all his files*, was never out of his sight. He claimed that he carried his files with him in a cardboard box even when he momentarily left his desk. (Tr. 690, 752-53).[3]

The testimony was critical to the prosecution and defense alike, as the Seventh Circuit panel recognized. (988 F.2d at 1513). If believed, Campbell's testimony helped prove the government's conspiracy theory, as the appeals panel acknowledged, *id.*, and as the government vigorously argued. (Tr. 153, 1336, 1444, 1448). But if Campbell's testimony were disbelieved, or at least doubted, the government's case may well have foundered.

Nonetheless, the district court refused to allow Stachnik to testify that he did not know and had never heard of any auto theft or other kind of detective in Miami or elsewhere who carried all of his active files with him in a box. (Tr. 1187-88, 1191-92, 1292).

The Seventh Circuit sustained this exclusion on two bases, both of which we respectfully submit misconstrued the record and are at odds with basic principles of rele-

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[3] Campbell claimed that he did not speak to Mr. Lowrance until September 14, at which time he claimed Lowrance made various false and incriminating statements.

vancy under Rule 401 and the expansive principles of admissibility of expert testimony under Rule 702.

First, the appeals panel held that Rule 702 was inapplicable because Mr. Lowrance did not seek to qualify Detective Stachnik as an expert. (Slip op. 8). The record does not support this conclusion, which also ignores this Court's holding in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). See note 6 infra. Page 1188 of the transcript, on which the Panel relied, reflects that we informed the court that Detective Stachnik would testify about an investigation he conducted involving Mercedes Benz 450's,[4] *and* that he never heard of any officer carrying his files with him in a box. It was in connection with the former aspect of Stachnik's testimony that we said he was not offered as an expert. He was offered as an occurrence witness to what he had observed during the investigation. The transcript makes clear that the government and the court understood that as to the latter aspect of the testimony—the impeachment of Campbell—he was being offered as an expert. *Immediately* following the explanation of why the impeachment of Campbell was critical, the government responded,

> the latter part [referring to the proposed impeachment] is clearly inadmissible. His *expertise* does not go to, you know, how they carry things and its a collateral matter. *As to the other thing* [referring to the investigation], Judge, I think it's one thing to intro-

[4] The investigation revealed that the stolen car operation went on for more than a year and was openly conducted out of the defendant's home. The purpose of the testimony was to counteract the government's proof that Lowrance's acquisition of a duplicate title to the Mercedes Benz 450 (which provided the VIN tags for the Hirschberg Mercedes) could not have innocently taken place since thieves are never around for an innocent purchaser to recontact.

> duce expert testimony as to generally how thieves operate. But just to call him—(Tr. 1188) (emphasis supplied).

It was in connection with this statement that Mr. Lowrance's counsel interjected, "he's not testifying as an expert." *Id.* That the court understood that this disavowal was directed only to that portion of the testimony dealing with the investigation is apparent from the colloquy occurring three pages later, to which the Panel made no reference:

> [THE COURT:] *I'm not going to allow him to testify as any kind of an expert on what police officers do with their files. He doesn't know what Miami does. I don't think he does anyway.*
> MR. COLE: *He says he does.*
> THE COURT: *Well, beyond that,* Campbell offered a particular reason for keeping that file unto himself or those files. He was investigating brother officers of the Miami Police Department or Miami-Dade or whatever it is. And I think to offer an opinion generally on the subject of how officers throughout the United States carry their files isn't *helpful* when the specific fact circumstance is presented as to why this happened in this context. So I don't think the jury is going to be *helped* by some *opinion* generally about what officers do under usual circumstances. Campbell made clear that the reason or the principal reason he did that was because unfortunately he was looking at other officers on occasions, and he didn't want anybody snooping through his files. *And we're going to have to be content with that.* So he can't testify to that. (Tr. 1191) (Emphasis supplied).[5]

[5] The court's statements clearly demonstrate that his ruling excluding the testimony was necessarily based on his acceptance of the truthfulness of Campbell's testimony. This begged the very

(Footnote continued on following page)

The district court's repeated references to and emphasis on helpfulness, following his statement that he would not "allow [Stachnik] to testify as any kind of an *expert* on what police officers do with their files", makes clear that he understood Stachnik was being offered as an expert on the question of the manner in which auto theft detectives maintain their files.[6]

Equally erroneous was the Seventh Circuit's alternate rationale that Detective Stachnik did not qualify as an

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[5] *continued*

question to be decided by the jury and impermissibly usurped its factfinding function. It constituted a glaring violation of Rule 104, Fed.R.Evid., which does not allow district courts to make credibility determinations in determining admissibility of evidence. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988); *United States v. Hudson*, 884 F.2d 1016, 1020 (7th Cir. 1989), *cert. denied*, 496 U.S. 939 (1990); *United States v. Russell*, 919 F.2d 795, 797 (1st Cir. 1990); *Western Industries, Inc. v. Newcor Canada Limited*, 739 F.2d 1198, 1202 (7th Cir. 1984).

[6] It is inconsequential that the defense did not utter the precise words "we offer Detective Stachnik as an expert." The purpose of the offer was obvious from the context, as borne out by the district court's comments and his focus on helpfulness, a concept unique to admissibility of *expert* testimony. *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991). The Supreme Court has stressed that where the purpose of proffered testimony is "obvious from the context", even counsel's misdescription of that purpose is irrelevant. It has recognized that in the heat of a trial, counsel frequently may not explain the evidentiary basis of an argument as might ideally be desired. However, it is enough if the court is adequately apprised of counsel's intent—as the district court clearly was here. Often, as here, the judge's response demonstrates the adequacy of the argument. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 173-175 (1988). This Court has also emphasized that a formal offer of proof is not necessary " 'if the record shows, either from the form of the question asked, or otherwise, what the substance of the proposed evidence is.' " *United States v. Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987). *Accord United States v. Alden*, 476 F.2d 378, 381 (7th Cir. 1973).

expert because "[he] had no knowledge of police practices in Miami. . . ." (988 F.2d at 1514). The record makes clear that when the court expressed concern that Detective Stachnik "doesn't know what Miami does," the defense made an offer of proof that he would testify that he *was* familiar with Miami detective practices. (Tr. 1191).[7]

Although both the district court and Seventh Circuit mistakenly assumed that Stachnik did not know about Miami police practices, those courts also erred in imposing such a requirement. Rule 702 only requires expertise in a specific subject, not necessarily knowledge of the specific geographic area involved in the case. Therefore even if Stachnik did not know about Miami police procedures

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[7] Even if Detective Stachnik had been unfamiliar with Miami practices, his exclusion as an expert was improper. This was a matter related only to the weight to be given his testimony. *See Boleski v. American Export Lines, Inc.*, 385 F.2d 69, 72 (4th Cir. 1967) (expert witness generally familiar with safety practices allowed to testify and "jury could determine what weight to give to his testimony, taking into consideration the fact that he was unfamiliar with practices in the Baltimore area"); *Wilder Enterprises v. Allied Artists Pictures*, 632 F.2d 1135, 1143 (4th Cir. 1980) (improper to exclude expert because of unfamiliarity with Norfolk-Virginia Beach market absent evidence that activities which were the subject of expert testimony varied according to geographic location); *Knight v. Otis Elevator Co.*, 596 F.2d 84 (3d Cir. 1979) (witness allowed to testify as expert about elevator design defect, despite his not having examined the elevator and lack of specific background in design and manufacture of elevators). The district court allowed Miami officer Smylie to testify as an expert about auto theft in Illinois based merely on his word to have had been involved in investigations of thefts of Chicago automobiles. (Tr. 557-60). Detective Stachnik's proffered familiarity with Miami practices should have been no less sufficient for purposes of expert qualifications. *Compare United States v. Selig*, 622 F.2d 207, 216 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980) (Error to preclude testimony of defendant's procedural expert who "was as qualified as" the prosecution's expert).

(contrary to the offer of proof concerning his testimony), his knowledge of auto theft investigation, and other police investigatory techniques, made his expertise relevant and his testimony admissible.

Moreover, any perceived weaknesses in Stachnik's testimony based on a supposed lack of familiarity with Miami, or because Stachnik did not know Campbell, or any other potential weaknesses, could have been explored on cross-examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 125 L.Ed.2d at 484 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)). Stachnik's familiarity with Miami police practices simply made the Seventh Circuit's error that much clearer.

The fact that he "did not know Campbell" (988 F.2d at 1514) is legally inconsequential. While personal familiarity would have qualified Stachnik to impeach Campbell's testimony as a *non-expert* (*see* Rules 602, 701), it was not the only basis on which his testimony could be bottomed. Knowledge of auto theft and other police investigatory practices, or knowledge of Miami practices were equally sufficient bases and qualified Detective Stachnik as an *expert* under Rule 702, which required admission of his testimony, so long as it was relevant under Rule 401—which it clearly was.[8]

[8] The Panel's requirement of personal knowledge would limit the spectrum of witnesses to those who would never controvert Campbell's claimed practice—his colleagues. *See DeSilva v. American Brands, Inc.*, 845 F.2d 356, 361 (1st Cir. 1988) (rejecting claim that only mechanical engineers with design experience with specific machine in question could testify since "[s]uch an approach would often mean that the only experts who could testify regarding a machine are those who have an interest in defending the design.").

Under Rule 401, the threshold for admissibility is exceedingly low. *Daubert*, 125 L.Ed.2d at 479; *United States v. Murzyn*, 631 F.2d 525, 529 (7th Cir. 1980); 4 Weinstein's Evidence, ¶401[06], at 401-39 (1991):

> Relevant evidence means evidence having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or *less probable* than it would be without the evidence. Rule 401 (Emphasis supplied).

Evidence tending to make a fact "less probable" is as relevant as evidence tending to make it "more probable", Weinstein, *supra*, ¶401[07], at 401-48, and "the cases reflect a liberal attitude toward the range of evidence that may be admitted for purposes of impeachment." *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir. 1981). *See also United States v. Stone*, 471 F.2d 170, 172 (7th Cir. 1972).

The Seventh Circuit's sanctioning of the exclusion of Detective Stachnik's proposed—and critically impeaching—testimony was an extreme departure from the plain language of Rule 401 and from the consistent holdings of that circuit. *Western Industries, Inc. v. Newcor Canada Limited*, 739 F.2d 1198, 1202 (7th Cir. 1984) reversed a verdict because the trial court had refused to allow an expert to testify that manufacturers giving disappointed buyers consequential damages was "unheard of in their trade." *United States v. Platt*, 435 F.2d 220 (7th Cir. 1970), *cert. denied*, 402 U.S. 913 (1971), held that it was proper for an attorney with 5½ years of experience involving 125 to 154 foreclosures, to testify that a certain motion to intervene was the only one of its kind he had ever seen. *Id.* at 224. *Cf. Romero v. International Terminal Operating Company*, 358 U.S. 354, 370 (1959) ("Negative testimony is often as compelling as bits of affirmative evidence.").

The exclusion of Detective Stachnik's testimony is also contrary to the uniform holdings of various courts of appeals which have stressed that "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony." *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991). *See also, Krist v. Eli Lilly & Co.*, 897 F.2d 293, 298 (7th Cir. 1990) ("the rule on expert testimony is notably liberal"); *Western Indus. Inc. v. Newcor Canada, Ltd., supra*; *Habecker v. Copperloy Corp.*, 893 F.2d 49, 51 (3d Cir. 1990).

The Rule "was intended to function as a broad rule of admissibility." *Arcoren*, 929 F.2d at 1239. Doubts about the usefulness of expert testimony should be resolved in favor of admissibility. 3 Weinstein, *supra*, ¶ 702[02] at 702-30; *United States v. Jakobetz*, 955 F.2d 786, 797 (2d Cir. 1992). Detective Stachnik was familiar with the practices of auto theft detectives in Florida and Illinois; he had been a police officer for 21 years and he, like the attorneys in *Platt* and *Newcor*, would have testified to the unheard nature of Campbell's claimed practice. He clearly had the "specialized knowledge . . . by knowledge, skill, experience, training, or education," to qualify as an expert and his testimony would have assisted "the trier of fact to understand the evidence or to determine a fact in issue. . . ." Rule 702.

The lay jurors did not have the slightest idea whether police officers in Miami or anywhere else did what Campbell claimed. For all they knew, not only was Campbell's claimed practice *not* "farfetched," it could well have been one most detectives followed. Had the jury been allowed to hear Stachnik's testimony, it could still have concluded that Campbell was not lying and that he had his own singular way of doing things. It could also have reached a very different conclusion.

The Seventh Circuit's conclusion that "the jurors were as able as [Stachnik with his 21 years of police experience] to determine whether Campbell's box theory was farfetched" is logically and factually insupportable. (988 F.2d at 1514). The jurors would have no basis, other than common sense, to question Campbell's testimony. Forcing them to rely on such uninformed common sense under these circumstances is contrary to the purpose behind Rule 702 of allowing expert testimony to assist the trier of fact.

The unduly restrictive rules for expert testimony which the Seventh Circuit applied—requiring that an expert have "personal knowledge" of the particular persons and geographic locations regarding which the expert is to provide an opinion—contravenes Rules 401 and 702, and is inconsistent with the practical needs of both jurors and defendants.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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